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Date Issued: January 3, 2001

Case No: 1999-BLA-0393

In the Matter of

MELVA L. HAYS, Widow of
HERSCHEL W. HAYS, Deceased

Claimant

v.

RAG AMERICAN COAL COMPANY

Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

Darlene Robinson, Esq.
Oakland City, Indiana
For Claimant

Scott A. White, Esq.
WHITE & RISSE, L.L.P.
St. Louis, Missouri
For the Employer

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended. 30 U.S.C. § 901 *et seq.* Under the Act, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis, commonly known as black lung, is defined in the Act as "a chronic dust disease of the lung and its sequelae, including pulmonary and respiratory impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

On October 8, 1998, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held in Bloomington, Indiana on Tuesday, May 16, 2000. The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been reviewed carefully, particularly those related to the miner's medical condition. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to "DX"[1], "EX", and "CX" refer to the exhibits of the Director, Employer, and Claimant, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

1. Whether the miner had pneumoconiosis as defined by the Act and regulations;

2. Whether the miner's pneumoconiosis arose out of coal mine employment; and

3. Whether the miner's death was due to pneumoconiosis.

(DX 29)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

[1] The Director's Exhibit numbers do not coincide with the enumeration on the List of Director's Exhibits. Exhibit numbers contained within this opinion refer to the numbers written on the exhibit itself, irrespective of the index provided by the Director.

Herschel W. Hays, Claimant's husband and the miner upon whom this claim is based, was born on December 31, 1924, and died on December 16, 1996. Claimant and the miner were married on July 9, 1946, and they resided together until the miner's death. They had no children who were under eighteen or dependent upon them at the time this claim was filed. At the time of the hearing, Claimant resided in Linton, Indiana and had not remarried. (DX 01)

Mr. Hays experienced shortness of breath, used oxygen twenty-four hours per day, and had difficulty performing normal activities. (DX 01) He testified at a previous hearing that he smoked up to one half package of cigarettes per day from the age of eighteen until 1969, or about twenty-seven years. (DX 19) A variety of smoking histories were reported by the physicians, ranging from never having smoked to one half package per day for twenty-eight years. I find that Mr. Hays smoked one half package of cigarettes per day for twenty-eight years.

Claimant, Melva L. Hayes, timely filed her application for survivor's benefits under the Act on March 3, 1997. The Office of Worker's Compensation Programs awarded benefits on August 19, 1997. This case was transferred to the Office of Administrative Law Judges on October 8, 1998. (DX 29)

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of the miner's coal mine work. *See, Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). On the application for benefits, Mrs. Hayes alleges that her husband was employed as a coal miner for thirty years, including sixteen years of underground coal mine employment. The parties stipulated to twenty-six years of coal mine employment. (DX 15) Therefore, I find twenty-six years of qualifying coal mine employment. Mr. Hays' coal mine work included duties as a road cleaner, rock duster, tipple laborer, and drill helper. During the earlier hearing, he described his duties as being hard work. (DX 15)

MEDICAL EVIDENCE

X-ray reports

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 22	unknown	06/28/71	Morgan / B	early dust retention, category 1 simple pneumoconiosis
DX 22	09/17/73	09/17/73	Caldwell / unknown	largely illegible, appearance of the chest could well be confused with pneumoconiosis
DX 22	07/01/85	07/01/85	McColley / unknown	bilateral interstitial disease
DX 22; DX 28	07/01/85	09/09/86	McGraw / BCR, B	1/0, p/p
DX 22	10/21/85	10/21/85	Ko / unknown	mild chronic interstitial lung disease
DX 22	10/21/85	03/27/86	Cole / BCR, B	1/2, q/s
DX 22	10/21/85	08/05/86	McGraw / BCR, B	1/0, p/p
DX 22	10/21/85	09/17/86	Renn / B	1/0, s/s
DX 28	10/21/85	10/16/86	Morgan / B	0/1, q/t
DX 28	10/24/85	10/24/85	Brown / unknown	mild chronic interstitial lung disease
DX 28	10/25/85	08/05/86	McGraw / BCR, B	1/0, p/p
DX 22; DX 28	10/25/85	09/17/86	Renn / B	1/0, s/s
DX 28	10/25/85	10/16/86	Morgan / B	0/1, q/r
DX 28	07/22/86	07/22/86	Lenyo / unknown	2/1, 2/2, 2/3
DX 22	07/22/86	01/23/87	McGraw / BCR, B	1/0, p/p
DX 22	07/22/86	02/06/87	Bridges / BCR, B	1/0, s/t
DX 22	01/06/88	02/22/88	McGraw / BCR, B	1/0, s/t
DX 22	01/06/88	03/10/88	Tyrrell / BCR, B	1/0, s/t
DX 22	01/21/88	01/21/88	Linge / unknown	miliary pulmonary nodules
DX 22	01/21/88	02/09/88	McGraw / BCR, B	1/1, q/p
DX 22	01/21/88	02/18/88	Tyrrell / BCR, B	1/0, s/t

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 14	09/17/91	09/17/91	Bathia / unknown	Essentially normal chest

"BR" denotes a "B" reader and "BCR" denotes a board-certified radiologist. A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services (HHS). A board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. See 20 C.F.R. § 718.202(a)(ii)(C). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

Pulmonary Function Studies

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
DX 28 / 07/01/85	Dukes	60 / 66	0.69	1.34	46	51	Yes	Unsure of effort, Breathing at times seemed controlled
			0.85*	1.76*	71*	48*	Yes	
DX 22 / 10/21/85	Deppe	60 /66	1.6	2.6	49	62	Yes	
DX 28 / 10/24/85	Deppe	60 / 66	1.73	2.62	63	65	Yes	Greater than 5% variation, results unreliable
DX 28 / 07/22/86	Lenyo	70 / 65	1.74	2.43	54	73	Yes	Excellent cooperation and comprehension
DX 28 / 01/06/88	Houser	63 / 65	2.00	2.84	57	70	Yes	Fair effort and cooperation
			2.01*	2.70*	56*	74*	Yes	
DX 22 / 01/21/88	Howard	63 / 66	2.14	3.06	N/A	69	Yes	

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
			2.37*	3.30*	N/A*	72*	Yes	
DX 05 / 08/12/92	Bhuptani	67 / 65	1.32	2.31	47	57	Yes	

*post-bronchodilator values

On September 9, 1986, Peter G. Tuteur, M.D., evaluated the validity of a pulmonary function study dated March 31, 1986 and opined that it was invalid. On September 15, 1986, Joseph J. Renn, M.D., evaluated the same pulmonary function study, opining as to its invalidity. The March 31, 1986 pulmonary function test is not contained within the record. There are no evaluations of record with regards to the pulmonary function studies performed on October 21, 1985 and August 12, 1992.

Dr. Tuteur evaluated the pulmonary function studies performed by Mr. Hays on 07/07/85, 10/24/85, 07/22/86, 01/06/88, and 01/21/88. He noted that the data was not reproduced, that breath volumes varied considerably, and that there were internal inconsistencies in the results. He opined that the results of these studies were invalid, except for the January 21, 1988 post-bronchdilator spirometer readings, which were within normal limits.

Dr. Renn also evaluated the pulmonary function studies performed by Mr. Hays on 07/07/85, 10/24/85, 07/22/86, and 01/06/88. He noted that the rates and depths of respiratory excursions were inconsistent, maximal effort was not maintained, and there existed inconsistencies in the results. Based upon the data, Dr. Renn opined that these results were invalid.

Arterial Blood Gas Studies

Exhibit	Date	pCO_2	pO_2	Resting/ Exercise
DX 22	10/21/85	38	85	Resting
		37	77	Exercise
DX 28	07/22/86	32.5	64.5	Resting
DX 28	01/06/88	37.1	61.1	Resting

Exhibit	Date	pCO_2	pO_2	Resting/ Exercise
DX 22	01/21/88	37	80	Resting
		32	76	Exercise
DX 14	12/25/91	36	81	

Narrative Medical Evidence

On June 26, 1985, Russell J. Dukes, M.D., examined Mr. Hays. (DX 22) Dr. Dukes noted twenty-six years of "off and on" coal mine employment and the fact that Mr. Hays did not smoke cigarettes at anytime. He further notes that Mr. Hays worked as a road cleaner, rock duster, coal driller, and laborer. Dr. Dukes performed a physical examination and reviewed "his old records," noting that Mr. Hays had previously been diagnosed with simple coal workers' pneumoconiosis. He referred Mr. Hays for a pulmonary function study, arterial blood gas study, chest x-ray and TB skin test. In a follow up visit on July 25, 1985, he reviewed the results of the pulmonary function and arterial blood gas studies, as well as the x-rays and opined that Mr. Hays had interstitial lung disease, restrictive ventilatory defect, and hypoxemia. Dr. Dukes went on to state that these conditions, in light of his work history, were all classic for coal workers' pneumoconiosis. He suggested that Mr. Hays avoid dust, fumes, and smoke. Dr. Dukes' credentials are not of record.

J. Timothy Deppe, M.D., physically examined Mr. Hays on October 21, 1985.[2] (DX 22) Dr. Deppe indicated Mr. Hays' coal mine employment by listing his positions as a driller/duster, tipple laborer, drill helper, and laborer, and noted sixteen years of underground employment. He reviewed Mr. Hays family history, individual health history, and noted that he had never smoked. He ordered pulmonary function and arterial blood gas studies and reviewed chest x-rays. Dr. Deppe does not opine as to the presence of pneumoconiosis, nor to disability. Dr. Deppe's credentials are not of record.

[2] The original report is undated, and the pulmonary function study and arterial blood gas study performed on October 21, 1985.

Ludimere Lenyo, M.D., examined Mr. Hays on July 22, 1986. (DX 28) Based upon a review of the x-rays, a twenty-nine and one half year coal mine employment history, and a smoking history of less than one half package of cigarettes per day since 1970, Dr. Lenyo opined that Mr. Hays had interstitial pulmonary fibrosis. Based upon pulmonary function study, arterial blood gas study, and physical examination, Dr. Lenyo opined that Mr. Hays had a restrictive lung defect which made him disabled from performing his usual coal mine work, and that this disability was directly caused by his pneumoconiosis. According to his letterhead, Dr. Lenyo is Board Certified in Internal Medicine.

William C. Houser, M.D., examined Mr. Hayes on January 6, 1988. (DX 22) Dr. Houser noted a twenty-nine and one half year coal mine history, and a one half package per day smoking history for eighteen years. Based upon x-ray evidence and a physical examination, Dr. Houser opined that Mr. Hays had coal workers' pneumoconiosis caused by his employment in the coal mines. Upon reviewing pulmonary function studies and arterial blood gas studies, he concluded that Mr. Hays was totally disabled from a respiratory standpoint due to the presence of pneumoconiosis. Dr. Houser's credentials are not of record.

On January 27, 1988, David W. Howard, M.D., examined Mr. Hays. (DX 22) Dr. Howard noted a twenty-six to twenty-eight year coal mine employment, and a smoking history consisting of one half package per day for twenty-eight years, ceasing in 1969 or 1970. Based upon a review of the x-rays, pulmonary function studies, arterial blood gas studies, an exercise test, and physical examination, Dr. Howard opined that Mr. Hays did not have disabling pneumoconiosis and was not totally disabled from a respiratory standpoint. He went on to comment that the x-rays showed nodules which were consistent with, but not diagnostic of coal workers' pneumoconiosis. Dr. Howard expected that if the nodules were in fact pneumoconiosis, some pulmonary impairment would manifest itself through the pulmonary function testing. Dr. Howard is Board Certified in Internal Medicine and Pulmonary Disease.

Peter G. Tuteur, M.D., issued a review of the medical data regarding Mr. Hays dated February 5, 1988. (DX 22) In that review, Dr. Tuteur noted twenty-eight years of coal mine employment, and a smoking history consisting of one half package of cigarettes per day for twenty-eight years. He reviewed x-rays, pulmonary function studies, arterial blood gas studies,

medical reports and examination reports, concluding that Mr. Hays did not have clinically or physiologically significant coal workers' pneumoconiosis. Dr. Tuteur did opine that Mr. Hays had radiographically significant coal workers' pneumoconiosis. He also noted that Mr. Hays had some exercise limitations but he opined that these limitations were not related to the presence of coal workers' pneumoconiosis.

Dr. Tuteur submitted an independent medical review dated February 17, 1998. (DX 23) He reviewed x-ray reports, pulmonary function studies, arterial blood gas studies, electrocardiographs, and a CT scan. Based upon this evidence and a one half package per day smoking history covering thirty years, Dr. Tuteur opined that Mr. Hays had coal workers' pneumoconiosis and lung cancer. He noted that Mr. Hays died in 1996 and concluded that the pneumoconiosis was not a substantial contributing factor to his death, nor did it hasten his death.

Dr. Tuteur was deposed on May 8, 2000. (EX 04) His testimony was consistent with and expounded upon his previous medical reports. He explained that Mr. Hays' pneumoconiosis was not disabling, evidenced by exercise tests in which he attained oxygen consumption rates ten to twelve times that necessary for rest. He maintained that the presence of pneumoconiosis did not in any way cause or hasten the demise of Mr. Hays. Dr. Tuteur is Board Certified in Internal Medicine and Pulmonary Disease.

On September 25, 1991, Mr. Hays was examined by Anand Bhuptani, M.D. Dr. Bhuptani noted a thirty year coal mining history and a less than one package per day smoking history of fifteen years. He diagnosed Mr. Hays with COPD and coronary artery disease post coronary artery bypass graft. He also noted a history of black lung disease, but offered no opinion as to its presence, etiology or impairment. Dr. Bhuptani's credentials are not of record.

Medical records from treating physician, Steven DuPre, M.D., spanning from 1991 to 1996, contain progress notes and communication notes from various physicians including; Thomas F. Orman, M.D., Michael Bournique, M.D., John D. Slack, M.D., and Frank J. Green, M.D. (DX 4, 12, 14) Dr. Orman was the treating physician for Mr. Hays' coronary conditions. He physically examined Mr. Hays and reviewed electrocardiographs and blood chemistry, for treatment of Mr. Hays for a variety of heart related health concerns. On various occasions, Dr. Orman notes

a medical history including black lung disease, and has ongoing diagnoses of hypertension, chest discomfort and fullness, unstable angina and diabetes mellitus. He noted a quintuple coronary artery bypass graft and performed cardiac catheterizations and angioplasty. Black lung disease is diagnosed as an explanation for Mr. Hays' shortness of breath. The credentials of Dr. Thomas F. Orman were not included in the record; therefore, I am taking official notice of them as listed on the American Board of Medical Specialties (ABMS). *See Maddaleni v. The Pittsburgh & Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990)(where the Board approved the practice of taking official notice of physicians' credentials). Official notice will be taken of the credentials of those physicians whose opinions are pertinent to the disposition of any issue to be decided. Dr. Orman is Board Certified in Internal Medicine and Cardiovascular Disease.

On October 3, 1996, Mr. Hays was examined by Ranga Brahmamdam, M.D., for evaluation and treatment of his adenocarcinoma. (DX 14) Dr. Brahmamdam reviewed chest x-rays and a pathology smear to determine the extent of the cancer. He opined that Mr. Hays was suffering from stage 3B lung cancer. He further opined as to the treatment possibilities for Mr. Hays. Dr. Brahmamdam excluded surgery as a treatment option due to the nature of the cancer, stating that it is not a surgical disease. He also excluded radiation as a treatment option due to his black lung disease, severe chronic obstructive pulmonary disease, and area of lung involved. He opined that there was no room for radiation and that it would cause further shortness of breath. Dr. Brahmamdam explained to Mr. Hays that "the condition is not curable and that the only effort we have is to reduce the site of the tumor and reduce the pleural effusion and make him comfortable and do good palliation and [we] might prolong survival." He further concluded that chemotherapy was the only palliative care option available to Mr. Hays. The credentials of Dr. Ranga Brahmamdam were not included in the record; therefore, I am taking official notice of them as listed on the American Board of Medical Specialties (ABMS). *See, Maddaleni,* supra. Dr. Brahmamdam is Board Certified in Internal Medicine, Hematology, and Medical Oncology.

On October 4, 1996, James B. Kho, M.D., performed a bone scan on Mr. Hays to investigate the extent of the cancer. (DX 14) Dr. Kho opined that the bone scan was negative for cancer

and did not opine as to pneumoconiosis or disability. Dr. Kho's credentials are not of record.

The record contains hospital summary and discharge reports regarding Mr. Hays treatments for lung cancer and coronary artery disease. Many of these records do not diagnose or offer opinions regarding coal workers' pneumoconiosis or disability. The hospital records mentioning black lung often list it as a medical history. The record also contains account statements from Mary Sherman Hospital which contain no information regarding the diagnosis of pneumoconiosis. (DX 14) These statements do report results of an arterial blood gas study performed on December 25, 1991.

After one treatment of chemotherapy, Mr. Hays was admitted to Union Hospital from December 12, 1996, to December 16, 1996, where he died at 1:30 a.m. (DX 6, 13) The admitting physician Chandra Reddy, M.D., examined him. Dr. Reddy noted that Mr. Hays had a history of black lung disease, hypertension, hypercholesterolemia, hiatal hernia, and diabetes mellitus. Dr. Reddy opined that Mr. Hays' cause of death was cardiopulmonary arrest secondary to the lung cancer and pleural effusion, ruling out brain metastasis and pericardial effusion and tamponade. Dr. Reddy's credentials are not of record.

On February 27, 1998, James R. Castle, M.D., submitted an independent medical review regarding Mr. Hays. (DX 23) Dr. Castle reviewed x-ray reports, medical reports, pulmonary function studies, arterial blood gas studies, and noted a one half package per day cigarette smoking history covering twenty-seven years. He observed radiographic changes which were consistent with coal workers' pneumoconiosis, but opined that Mr. Hays "may possibly have radiographic evidence of coal workers' pneumoconiosis." He went on to opine that even if Mr. Hays did have radiographic evidence of coal workers' pneumoconiosis, he was not impaired by it. He concluded that Mr. Hays died of lung cancer and coronary artery disease and that coal workers' pneumoconiosis did not cause, contribute to, or hasten death.

Dr. Castle was deposed on May 10, 2000. (EX 05) His testimony was consistent with his previous medical report wherein he opined that Mr. Hays was not impaired by pneumoconiosis, noting exercise tests where Mr. Hays was able to attain an oxygen consumption of ten to twelve times that necessary at rest, a substantial capacity. He maintained that

the presence of pneumoconiosis did not in any way cause or hasten the demise of Mr. Hays. Dr. Castle is Board Certified in Internal Medicine and Pulmonary Disease.

Gregory J. Fino, M.D., provided an independent medical report dated March 7, 1998. (DX 23) Dr. Fino reviewed medical reports, x-ray reports, pulmonary function studies, arterial blood gas studies, exercise tests, and hospital records. He noted the employment histories and smoking histories contained in other medical reports, but is silent with respect to the histories upon which he based his own review. Dr. Fino opined that Mr. Hays had simple coal workers' pneumoconiosis, but prior to the development of cancer, he had no pulmonary impairment or disability. He further opined that the coal workers' pneumoconiosis did not cause, contribute, or hasten the death of Mr. Hays.

Dr. Fino was deposed on May 5, 2000. (EX 03) His testimony was consistent with his medical report, opining that Mr. Hays had pneumoconiosis but was not disabled by it. He opined that Mr. Hays' lung cancer was inoperable and that radiation treatments would be ineffective. He noted that radiation can cause shortness of breath, but stated that for a breathing problem to rule out radiation as a treatment for cancer one would have to weigh the risks versus the benefits. He continued to opine that coal workers' pneumoconiosis did not cause, contribute to, or hasten Mr. Hays' death. Dr. Fino is Board Certified in Internal Medicine and Pulmonary Disease.

Dr. Renn provided an independent medical review dated March 23, 1998, in which he reviews medical reports, x-rays, pulmonary function studies, arterial blood gas studies, CT scan, and exercise tests. He noted a twenty-nine year coal mine employment history and the variety of reported smoking histories. Dr. Renn opined that Mr. Hays had mild coal workers' pneumoconiosis, but that Mr. Hays was not impaired or disabled by the pneumoconiosis. He opined that Mr. Hays died because of his lung cancer, and that his death was not caused, contributed to, or hastened by the presence of pneumoconiosis.

Dr Renn was deposed on November 4, 1999. (EX 02) His testimony was consistent with his independent medical review. In his deposition, he disagreed with Mr. Hays' treating physicians that radiation was an appropriate treatment for his carcinoma. Dr. Renn stated that the location and type of cancer dictates the appropriate treatment, and he opined that Mr. Hays'

adenocarcinoma was not of the type or location that radiation would have been an appropriate treatment. Dr. Renn is Board Certified in Internal Medicine and Pulmonary Disease.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed her application for survivor's benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. To establish entitlement to benefits under this part of the regulations, Claimant must prove by a preponderance of the evidence that the miner had pneumoconiosis, that his pneumoconiosis arose from coal mine employment, and that his death was due to pneumoconiosis. *Peabody Coal Co. v. Director, OWCP,* 972 F.2d 178 (7th cir. 1992).

Pneumoconiosis

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. In evaluating the x-ray evidence, I assign heightened weight to interpretations of physicians who qualify as either a board-certified radiologist or "B" reader. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). I assign greatest weight to interpretations of physicians with both of these qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

The evidence of record contains twenty-two interpretations of ten chest x-rays. Of these interpretations, four were negative for pneumoconiosis while fourteen were positive. Each and every dually qualified physician interpreted the x-rays as positive for pneumoconiosis. Because the positive readings constitute the majority of interpretations and are verified by more highly-qualified physicians, I find that the x-ray evidence supports a finding of pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. This section is

inapplicable to this claim because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions apply to this claim, Claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides that a claimant may establish the presence of pneumoconiosis through a reasoned medical opinion. Drs. Castle, Dukes, Fino, Houser, Lenyo, Renn, and Tuteur all opine that Mr. Hays had coal workers' pneumoconiosis. Several physicians did not opine regarding the presence of pneumoconiosis and one physician, Dr. Howard, opines that Mr. Hays did not have "disabling" coal workers' pneumoconiosis.

Dr. Howard noted that the chest x-rays showed nodules consistent with the presence of coal macules, but he did not specifically find as to the presence or absence of pneumoconiosis, rather stating that Mr. Hays did not have "disabling" pneumoconiosis. A failure to find "disabling" pneumoconiosis is not equivalent to a finding of an absence of pneumoconiosis. Drs. Fino, Renn, and Tuteur all opine that pneumoconiosis can be present without resulting in an impairment. I therefore find Dr. Howard's opinion to constitute a positive finding of non-disabling pneumoconiosis. See, *Mooney v. Peaboby Coal Co.,* BRB No. 93-1507 BLA (Oct. 30, 1996)(unpub.)

All physicians specifically opining as to the presence of pneumoconiosis, positively found that Mr. Hays had pneumoconiosis. Therefore, based upon the x-ray evidence and the reasoned medical opinion of the physicians, I find that Mr. Hays had coal workers' pneumoconiosis.

Causation

Once pneumoconiosis has been established, the burden is upon Mrs. Hays to demonstrate by a preponderance of the evidence that the pneumoconiosis arose out of Mr. Hays' coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

I have found that Mr. Hays was a coal miner for twenty-six years, and that he had pneumoconiosis. Mrs. Hays is entitled to the presumption that Mr. Hays' pneumoconiosis arose out of his employment in the coal mines. Employer offers no alternative explanation or evidence. Accordingly, I find that Mr. Hays' coal workers' pneumoconiosis was caused by his employment in the coal mines.

Death and Causation

Mrs. Hays is entitled to benefits as Mr. Hays' survivor if she demonstrates that his death was due to pneumoconiosis. 30 U.S.C. § 901(a); 20 C.F.R. § 718.205(a). 20 C.F.R. § 718.205(c) provides that:

> For the purpose of adjudicating survivors' claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:
>
> 1. Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
>
> 2. Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
>
> 3. Where the presumption set forth at §718.304 is applicable.

> 4. However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or a principal cause of death was a medical condition not related to pneumoconiosis, unless pneumoconiosis was a substantially contributing cause of death.

The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction the instant case arises, has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death, even if only briefly. *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992). Mrs. Hays has the burden of demonstrating by a preponderance of the evidence that pneumoconiosis was a substantially contributing cause of Mr. Hays' death.

Section 718.205(c)(1) provides for benefits upon a showing that death was due to pneumoconiosis. Mr. Hays died at 1:30 a.m. on December 16, 1996. Dr. Reddy was the admitting physician for Mr. Hays when he entered the hospital. Upon Mr. Hays' demise, Dr. Reddy wrote a discharge report and a supplemental discharge report which lists cardiopulmonary arrest secondary to lung cancer and pleural effusion as the cause of death. Drs. Castle, Fino, Renn, and Tuteur, attribute Mr. Hays' lung cancer to the inhalation of cigarette smoke. There is no evidence offered which would show that the adenocarcinoma was caused by the inhalation of coal dust, or the presence of pneumoconiosis. Therefore, I find that Mr. Hays' death was due to cardiopulmonary arrest secondary to lung cancer and pleural effusion and that his lung cancer could have been caused by the inhalation of cigarette smoke.

Drs. Castle, Fino, Renn, and Tuteur opine that the presence of pneumoconiosis did not cause, contribute to, or hasten death. Drs. Castle and Tuteur discuss the causation of the pneumoconiosis, its physiological effects, and the progression of lung cancer which ultimately lead to Mr. Hays' demise. They opine that the presence of pneumoconiosis, or complications from pneumoconiosis, were not involved in hastening Mr. Hays' death. The physicians do not, however, discuss the effects that radiation treatment may have had on Mr. Hays' survival. Dr. Brahmamdam withheld the use of radiation to treat Mr. Hays' cancer, in part, because of the presence of pneumoconiosis.

Drs. Castle and Tuteur's opinions do not address the fact that pneumoconiosis foreclosed a treatment possibility with the potential for prolonging life. Without that consideration, I find the reasoning and documentation of Drs. Castle and Tuteur to be inadequate and therefore give less weight to their opinions.

Mr. Hays' treating physician with respect to his adenocarcinoma was Dr. Brahmamdam. He opined in a hospital medical report that Mr. Hays had stage 3B lung cancer and that the lung cancer could be treated in three ways: surgery, radiation, and chemotherapy. Dr. Brahmamdam ruled out surgery as an option due to the extent and location of the cancer, leaving only radiation and chemotherapy. He ruled out radiation therapy based, in part, on the presence of pneumoconiosis. He utilized chemotherapy for palliation and to prolong survival. Dr. Brahmamdam does not, however, state in his opinion that the use of radiation therapy would have the effect of prolonging Mr. Hays' survival. In his opinion he discusses the effect of pneumoconiosis on the choice of treatments, but does not discuss the results that the foreclosed treatment would have achieved. Therefore, he does not opine that the use of radiation would have, in fact, prolonged Mr. Hays' life, even if only briefly.

Dr. Renn opined in his deposition that radiation was not a viable treatment for adenocarcinoma, but that, when appropriate, an affected area could be palliated through radiation therapy. On deposition, Dr. Fino also disagreed with Dr. Brahmamdam, opining that radiation was not going to be of any benefit. He further stated, "I treat lung cancers . . . and someone with an adenocarcinoma with a pleural effusion, radiation is not going to be beneficial." Dr. Fino further opined that a risk versus benefit analysis would have to be performed to determine if shortness of breath would itself rule out the use of radiation therapy.

It is Claimant's burden to demonstrate by a preponderance of the evidence that Mr. Hays' pneumoconiosis caused, contributed to, or hastened his death. See, ***Railey***, supra. The Supreme Court of the United States relates the term "preponderance of the evidence," to "the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding." See, ***Steadman v. SEC***, 450 U.S. 91, 101 S.Ct. 999 (1981). If that

degree is a preponderance, then the initial trier of fact must believe that it is more likely than not that the evidence establishes the proposition in question. *Id*. In this case, no physician specifically opines to the direct effect of radiation therapy on prolonging survival. Drs. Fino and Renn opine that radiation therapy was not appropriate, and therefore do not opine that such treatment would or would not have prolonged Mr. Hays' life. Dr. Brahmamdam opines that radiation would have been an available treatment option *in an effort* to prolong life, but he does not specifically opine that radiation treatments would have prolonged Mr. Hays' survival, even if only briefly. Without an opinion that the foreclosed treatment possibility would have prolonged survival Mrs. Hays cannot demonstrate by a preponderance of the evidence that pneumoconiosis hastened Mr. Hays' death, and therefore this claim must be denied.

Accordingly, I find that Mr. Hays had coal workers' pneumoconiosis, which arose out of coal mine employment. I further find, however, that Mr. Hays' pneumoconiosis did not cause, contribute to or hasten his death.

ORDER

Accordingly, the claim of Melva L. Hays for survivor's benefits under the Act is hereby denied.

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Rudolf L. Jansen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. A copy of this Notice of Appeal also must be served on Donald S.

Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.